



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Collins Companies

File: B-274765

Date: December 27, 1996

Joel S. Rubenstein, Esq., Bell, Boyd & Lloyd, for the protester.
Col. Nicholas P. Retson, Department of the Army, for the agency.
Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Bid which included only a facsimile copy of a required bid bond and power of attorney was properly rejected as nonresponsive.

DECISION

Collins Companies protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DAKF57-96-B-0027, issued by the Department of the Army to replace siding on military housing units at Fort Lewis, Washington. The Army rejected Collins's bid as nonresponsive because it contained only facsimile bid bond documents; the Army viewed such documents as not establishing that the surety would be bound to honor the bond in the event of default. Collins argues that its facsimile bid bond was authorized and binding and that therefore rejection of its bid was improper.

We deny the protest.

The IFB, which was issued on August 14, 1996, with bid opening on September 13, required bidders to submit a bid bond in the amount of 20 percent of the bid price or \$3,000,000, whichever was less. On the day of bid opening, a representative of Collins called the contracting specialist to ascertain whether its bid package had been received; upon being informed that it had not been received, the representative asked whether a telefacsimile bid would be acceptable. The protester asserts that in the ensuing conversation with the contracting specialist, it was informed that it would be acceptable to "fax everything over." According to the contract specialist's sworn account of the conversation, she informed the representative that a telefaxed bid would be unacceptable because the Army needed original signatures on all documents. Further, according to the specialist's statement, when Collins's representative asked if a copy could be telefaxed to an associate of the firm located in the area of the bid opening and then signed and

hand delivered, she informed the representative that this would be an acceptable method of transmission if the bid documents all bore original signatures of persons authorized to bind the firm and if they were delivered in a sealed envelope prior to the time set for bid opening.

The package received from Collins by the time set for bid opening contained a bid with the original signature of an authorized representative on the cover page. All documents relating to the bid bond were, however, telefaxed copies which bore no original signatures. As a result, the contracting officer rejected Collins's bid as nonresponsive and this protest followed.

A bid bond is a form of guarantee designed to protect the government's interest in the event of default; if a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all reprourement costs. As such, a required bid bond is a material condition of an IFB with which there must be compliance at the time of bid opening; when a bidder submits a defective bid bond, the bid itself is rendered defective and must be rejected as nonresponsive. The determinative question as to the acceptability of a bid bond is whether the bid documents, including the power of attorney appointing an attorney-in-fact with authority to bind the surety, establish unequivocally at the time of bid opening that the bond is enforceable against the surety should the bidder fail to meet its obligations. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Morrison Constr. Servs., B-266233; B-266234, Jan. 26, 1996, 96-1 CPD ¶ 26.

Photocopies of bid guarantee documents generally do not satisfy the requirement for a bid guarantee since there is no way, other than by referring to the originals after bid opening, to be certain that there had not been alterations to which the surety had not consented, and that the government would therefore be secured. Id. A telefaxed bid guarantee document, which is an electronically transmitted copy, is subject to the same uncertainty as a photocopy transmitted by mail; since it is not the original, there is no way to be certain that unauthorized alterations have not been made without referring to the original documents after bid opening. Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31¹.

Collins first asserts that, based on the September 13 conversation between its representative and the contracting specialist concerning telefaxed bids, the agency is estopped from rejecting its bid since, according to Collins, the specialist authorized the electronic method of transmission. As indicated above, in the contracting specialist's statement recounting the conversation she denies that such

¹Here, the agency properly refused to consider documents submitted by Collins after bid opening which were intended to establish the responsiveness of its bid.

advice was given. In any event, even if we were to accept Collins's version, oral advice concerning the acceptability of photocopied (or telefaxed) bid bonds is not binding; a contractor relies on oral advice with respect to solicitation requirements at its own risk. Pollution Control Indus. of Am., B-236329, Nov. 22, 1989, 89-2 CPD ¶ 489.

Collins next argues that the telefaxed bid bond package, when read as a whole, establishes that the surety would be bound to honor the bond in the event of default. For the reasons set forth below, we disagree.

The power of attorney form contained in the package contained the following statement in the left margin:

"WARNING
THIS IS NOT A VALID POWER OF ATTORNEY IF THIS
STATEMENT DOES NOT APPEAR IN RED INK"

In the telefaxed copy submitted to the Army in Collins's bond package, the quoted warning appeared in black print. This fact would appear to make the power of attorney invalid on its face, thus calling into question the authority of the purported attorney-in-fact named in the document. Global Eng'g, supra. Collins argues that other language contained in the power of attorney form obviates this apparent invalidity. In particular, Collins refers to the following excerpt from a resolution of the surety's board of directors quoted on the form:

". . . the signatures of [designated corporate officers] and the seal of [the surety] may be affixed to any such power of attorney or to any certificate relating thereto by facsimile. . . ." (Emphasis added.)

We have expressly considered this argument on other occasions where a telefaxed or photocopied power of attorney contained virtually identical language. It is our view that phrases such as "affixed by facsimile" do not refer to telefaxed or photocopied documents, but rather to signatures produced by mechanical means, for example, stamped, printed or typewritten signatures. In short, the language does not reasonably suggest that the surety consented to be bound by bid bonds which, after leaving the surety's hands, had been photocopied or telefaxed. Frank and Son Paving, Inc., B-272179, Sept. 5, 1996, 96-2 CPD ¶ 106; Morrison Constr. Servs., supra; Global Eng'g, supra.

Collins attempts to distinguish its situation by arguing that another document contained in its telefaxed bid bond package authorizes transmission of bond documents by electronic means. Specifically, the protester points to a telefaxed letter dated September 13 and signed by the purported attorney-in-fact which states: "This letter authorizes Collins Companies to use in place of the original bid bond

and power of attorney a fax copy of the same." The problem with this reasoning is that the individual purporting to bind the surety under a telefax authorization is himself authorized by a power of attorney form which, as discussed above, is legally invalid on its face. Under these circumstances, this individual's letter has no legal effect.

Since the telefaxed bid bond package contained in Collins's bid did not unequivocally establish that the surety would be bound to honor the bond in the event of default, the bid was properly rejected as nonresponsive. Morrison Constr. Servs., supra.

The protest is denied.

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